Filed 9/22/06 In re John S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re JOHN S., JR., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. JOHN S., SR., Defendant and Appellant.	E040237 (Super.Ct.No. RIJ108076) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Michael D. Randall, under appointment by the Court of Appeal, for Minor.

INTRODUCTION

Appellant John S., Sr., appeals from the juvenile court's order terminating his parental rights and selecting adoption as the permanent plan for his son, John S., Jr. (the minor). Appellant argues that the juvenile court erred because neither it nor the Department of Public Social Services (DPSS) inquired under the Indian Child Welfare Act (ICWA) as to whether the minor might be an Indian child. (25 U.S.C.A Code § 1901 et seq.)

STATEMENT OF FACTS

The infant minor was taken into protective custody on June 9, 2004, because he was born four to six weeks premature, his mother tested positive for amphetamine and marijuana at his birth, and the mother was homeless and had no baby supplies.

At the July 6, 2004, jurisdiction hearing, the juvenile court found the allegations in the Welfare and Institutions Code section 300 petition to be true. [1, 2] The court denied reunification services to the minor's mother because she had failed to reunify with, and had her parental rights terminated as to, the minor's half sibling and had a substance abuse problem that resisted treatment. (§ 361.5, subd. (b) (10), (11), (13).) The court also denied reunification services to appellant because he could not be located. (§ 361.5,

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[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

[2] The section 300 petition was filed on June 11, 2004. It alleged the parents failed to protect the minor because they were homeless and abused drugs.

subd. (b)(1).) The court set a section 366.26 selection and implementation hearing for November 3, 2004.

On October 13, 2004, appellant, for the first time, contacted the minor's social worker from jail by telephone. Appellant stated that, while he would be incarcerated for another five months, he loved the minor and wanted to raise him. The social worker sent appellant a family history medical questionnaire, but the record does not reflect any inquiry into the minor's Indian ancestry. The November 3, 2004, section 366.26 hearing was continued and counsel was appointed for appellant. Although the juvenile court ordered the Riverside County Sheriff to transport appellant to the November 18, 2004, hearing, he was not transported. Appellant was transported to the January 12, 2005, hearing, which was set contested for March 8, 2005.

Appellant was present in custody at the March 8, 2005, hearing. The juvenile court ordered DPSS to provide appellant with reunification services. Appellant was released from jail on March 24, 2005. The hearing set for April 13, 2005, was continued to May 2, 2005. In the status review report prepared for that hearing, the social worker reported that appellant had not yet contacted her after he was released from jail and that DPSS did not know of his whereabouts. The May 2, 2005, hearing was continued to June 15, 2005. At the June 15, 2005, status review hearing, the juvenile court terminated reunification services to appellant, and set a contested selection and implementation hearing for October 13, 2005.

In June 2005, DPSS located appellant in custody and notified him of the October 13, 2005, hearing. The October 13, 2005, hearing was continued at the request of

appellant's counsel. Subsequent hearings set for November 14, December 9 and 19, 2005, and February 1, 2006, were continued because the Riverside County Sheriff did not transport appellant to those hearings. At the March 2, 2006, selection and implementation hearing, counsel for appellant informed the juvenile court that appellant did not wish to be present for the hearing, but requested that the hearing be continued until appellant's anticipated release date in October 2006. The juvenile court denied the continuance, terminated appellant's parental rights, and selected adoption as the permanent plan.

DISCUSSION

1. *Appellant's Contention*

Appellant argues that the juvenile court erred in proceeding with the termination of his parental rights where the evidence showed that neither the court nor DPSS ever inquired of appellant as to whether the minor was an Indian child.

2. *ICWA Notice Requirements*

"In general, the ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912-1921.) 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . .' (25 U.S.C. § 1903(4).) 'Indian tribe' is defined so as to include only federally recognized Indian tribes. (25 U.S.C. § 1903(8).)

"Concerning notice, the ICWA provides: '[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the [Bureau of Indian Affairs (BIA)] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by . . . the tribe or the [BIA] . . . .' [Citations.]" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338, quoting 25 U.S.C. § 1912(a).)

3. *Harmless Error*

Even assuming the duty of inquiry was not satisfied, and it appears from this record that neither the juvenile court nor the DPSS inquired as to the minor's Indian ancestry, the error was harmless. The source of the duty of inquiry is California Rules of Court, rule 1439(d), not the ICWA. "[A]ny failure to comply with a higher state standard, above and beyond what the ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error. (Cal. Const., art. VI, §13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.)

Here, there is absolutely nothing in the record to suggest that, if the juvenile court or the DPSS had inquired, appellant would have reported any Indian ancestry.

Accordingly, on this record, even if we were to reverse and remand with directions to make the requisite inquiry, there is no reason to suppose that the outcome would be any different. The only result would be waste and delay.

DISPOSITION

The judgment of the juvenile court is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.